

JUSTICE COURT OF THE TOWN OF ORANGETOWN
COUNTY OF ROCKLAND

PEOPLE OF THE STATE OF NEW YORK

-against-

API INDUSTRIES, INC.,
Defendant.

Docket # 18120420
Docket # 18120426
Docket # 18120432
Docket # 18120440

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| DECISION, ORDER AND VERDICT |
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PEOPLE OF THE STATE OF NEW YORK

-against-

ALUF REAL PROPERTY, INC,
Defendant.

Docket # 18120418
Docket # 18120423
Docket # 18120430
Docket # 18120439

PEOPLE OF THE STATE OF NEW YORK

-against-

JOSEPH ROSENBERG, AS TRUSTEE OF R.
ROSENBERG FAMILY TRUST,
Defendant.

Docket # 18120443
Docket # 18120417
Docket # 18120429
Docket # 18120435

PEOPLE OF THE STATE OF NEW YORK

-against-

MIRIAM ORATZ, AS TRUSTEE OF R.
ROSENBERG FAMILY TRUST,
Defendant

Docket # 18120416
Docket # 18120424
Docket # 18120433
Docket # 18120445

PEOPLE OF THE STATE OF NEW YORK

-against-

R. ROSENBERG FAMILY TRUST,
Defendant

Docket # 18120419
Docket # 18120427
Docket # 18120434
Docket # 18120442

PEOPLE OF THE STATE OF NEW YORK

-against-

SUSAN ROSENBERG,
Defendant,

Docket # 18120422
Docket # 18120428
Docket # 18120436
Docket # 18120441

PEOPLE OF THE STATE OF NEW YORK

-against-

GISELLE SCHONKOPF, AS TRUSTEE OF R.
ROSENBERG FAMILY TRUST,
Defendant

Docket # 18120421
Docket # 18120425
Docket # 18120437
Docket # 18120444

RICHARD C. FINNING, J.:

BACKGROUND

A bench trial on the charges contained in the Informations filed under the twenty-eight (28) above referenced Docket Numbers was begun on August 29, 2019 and concluded on September 5, 2019. Thirteen witnesses testified at trial. Seven Defendants, in varying relationship to the real property where the violation is alleged to have occurred, were each charged with violating §4.182(a) of the Town Code on various dates. At the conclusion of the trial Defense Counsel requested time to submit a memorandum of law in support of an oral motion to dismiss the Informations on several different grounds. The Court initially gave Defendant until September 19, 2019 to submit Defendant's Memorandum of Law in Support of its motion to dismiss the Informations and the People until October 4, 2019 to submit the People's Reply Memorandum of Law. At the request of Defense counsel those dates were later extended by one week. Defendant's Memorandum of Law was submitted to the Court on September 27, 2019 and the People's Reply Memorandum of Law was submitted to the Court on October 11, 2019 and both have been read and considered by the Court.

THE SUBJECT ACCUSATORY INSTRUMENTS

Each Defendant was charged with violating Section 4.182(a) of Chapter 43 of the Code of the Town of Orangetown (Chapter 43 is hereinafter, "Code" or "Zoning Code") at the real property commonly known as 2 Glenshaw Street,

Orangeburg, N.Y. within the Town of Orangetown, County of Rockland and State of New York (hereinafter, "the subject property") on several different dates.

Code §4.182(a) states:

4.182.

Odors.

(a).

No person, entity or process will emit, or cause or allow to be emitted, objectionable odors or other matter present in the ambient air that, by itself, or in combination with other odors, gases or vapors from the same facility, is offensive, foul, unpleasant or repulsive to olfactory reception to a reasonable person of normal sensibilities, beyond the property borders of the emitting source. Odors will be deemed objectionable when documented assessment by the Town, pursuant to the procedures in this section, shows evidence that the odor likely could, or does, cause injury, detriment, nuisance or annoyance to persons or to the public, based on observations of the odor's nature, intensity, duration, location, and level of complaint.

**PROCEDURES REQUIRED UNDER §4.182(b) ARE NOT A
PRE-REQUISITE TO PROSECUTION FOR VIOLATION OF §4.182(a)**

At the outset, the Court notes that §4.182(b) states, in pertinent part:

Upon documented assessment by the Town, pursuant to the procedures in this section, of the existence of an objectionable odor, the Town will notify the odor-producing facility and direct that an odor management and control plan (hereinafter referred to as "plan") be submitted, to the Town, that outlines the operational cause of the objectionable odor, and, if available, chemistry of the offending odor(s) and literature evidence of odor thresholds and impacts, methods proposed to mitigate the problem, and the schedule by which the plan will be implemented and completed. The Town will review the plan to determine whether it **is reasonably calculated to prevent future emissions of objectionable odors** to the maximum extent practicable and, on that basis, either approve the plan, approve the plan with conditions, or reject the plan.

(i).

If an odor management and control plan is not submitted by the odor-producing facility within 10 business days of the Town's notification and direction to the odor-producing facility to submit a plan, as described in this § 4.182(b), or within any extended period of time agreed or consented to by the Town, or if a submitted plan is rejected by the Town, **then the Town shall have all remedies prescribed in § 4.13.**

[Emphasis added]

The Court reads §4.182 as making it unlawful to emit (or cause or allow to be emitted) objectionable odors beyond the property borders of the emitting source [under subsection (a)] and also as making it unlawful to fail to submit an acceptable odor management and control plan to the Town within 10 business days of the Town's notification to do so [under subsection (b)]

Accordingly, the procedures required under Code §4.182(b) are not a prerequisite to prosecution for a violation of Code §4.182(a).

THE REQUIREMENTS FOR OBSERVATIONS CONTAINED IN §4.18 DO NOT APPLY TO PROSECUTIONS IN JUSTICE COURT PURSUANT TO §10.61(a).

Code § 4.18 states, in pertinent part:

Measurement at other specified points. The existence of the following dangerous and objectionable elements shall be determined at or beyond the different locations in different districts in relation to the establishment under consideration, and these shall be measured as follows: (b) in LO, LIO and LI Districts at the boundary of the R or MFR District nearest the establishment in any direction, provided that such measurement shall not be taken from a point located on any property owned or occupied by the applicant. [For the purpose of investigating any purported violation of §§ 4.181, 4.182 and 4.183, **as provided in § 8.335**, observations shall be taken on at least three nonconsecutive days at no less than three points along or beyond the lines specified in (a) or (b) above." [Emphasis Added].

The People, in their post-trial memorandum of law, correctly note that the Zoning Code does not contain a §8.335 but does contain a § 10.335, which section is a subsection of §10.33 which details the Powers of the Zoning Board of Appeals ("ZBA"). § 10.335 details the steps the ZBA must take to investigate a violation of a performance standard in order "...to revoke and rescind its performance standards (Zoning Code § 4.1) approval decision, and any building permit and/or certificate of occupancy that has been issued, based upon such approval decision..".

Accordingly, the requirements in §4.18 that observations shall be taken on at least three nonconsecutive days at no less than three points along or beyond the lines do not do not apply to a prosecution under §10.61(a).

Further, it is a commonplace of statutory construction that the specific governs the general.” *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992). Under the canons of construction, general statutory provisions are overruled by more specific and recent provisions. *Matter of Bush v. Salerno*, 51 N.Y.2d 95, 432 N.Y.S.2d 679, 412 N.E.2d 366 (3d Dept.1980); *Matter of Constantine v. White*, 166 A.D.2d 59, 569 N.Y.S.2d 765 (3d Dept.1991); *National Organization for Women v. Metropolitan Life Insurance Company*, 131 A.D.2d 356, 516 N.Y.S.2d 934 (1st Dept.1987).

The Court takes judicial notice that the general provisions of §4.18 pre-date the specific recent amendments to §4.182 enacted by way of Local Law 8 on July 24, 2018. The specific provision of §4.182(c) states, in pertinent part, that: “**To enforce this performance standard**, objectionable odors will be considered **detected** when:.....” the procedures in that section have been followed . [Emphasis Added].

FURTHER INTERPRETATION OF ZONING CODE SECTION 4.182(c)

Code Section §4.182(c) states, in pertinent part :

“To enforce this performance standard, objectionable odors will be considered detected when:

(i).

A Town inspector/code enforcement officer documents an objectionable odor that, by its nature, intensity, duration, location, and level of complaint, is, at least minimally, a nuisance or annoyance to persons or to the public; or

(ii).

The Town receives initially five or more complaints from individuals, households or businesses within seven days, or 15 or more complaints within a thirty-day period, and the odor issue is verified by the Town as per the final paragraph in this § 4.182(c)(ii) below.....

The Town's odor complaint verification shall be satisfied if one volume of the odorous air has been diluted with up to five volumes of odor-free air and the odor is still perceptible, as measured by the Town through the use of olfactometer field instruments, devices, or methods calibrated to detect odors at the same levels as perceptible to a reasonable person of average sensibilities

Thus, §4.182(c)(i) does not require personal observation of an odor by the Town Inspector/Code Enforcement Officer as part of its regime but merely requires that the Code Enforcement Officer *document* an objectionable odor that, by its nature, intensity, duration, location, and level of complaint, is, at least minimally, a nuisance or annoyance to persons or to the public.

Further, when the People can establish that an objectionable odor has been detected under the dictates of §4.182(c)(i) there is no need to establish an objectionable odor has been detected under the dictates of §4.182(c)(ii) – an thus no need, for that purpose, of testing via the use of an olfactometer or other such device.

LEGAL SUFFICIENCY OF THE ACCUSATORY INSTRUMENTS

Each of the Informations, which were tried together state, in pertinent part, that the named Defendant is being charged with violating §4.182(a) of the Orangetown Code, recites the entire text of §4.182(a), states the date, time and location of the alleged offense, states the named defendant's alleged relation to the location (eg. "tenant"), the basis for the named defendant's liability (e.g , "As

such exercised dominion and control over the subject premises “), and that the Defendant emitted odors beyond property borders that were objectionable, unpleasant, and/or offensive to person or the public and are either based on personal knowledge of the complainant or supporting depositions of witnesses with first-hand knowledge of the allegations in the Information.

The Court finds all of the Informations to be facially sufficient pursuant to the dictates of CPL §100.15 and CPL§100.45 as each accusatory instrument, together with the supporting deposition, contains allegations which established, if true, every element of the offense charged and defendant's commission thereof (see CPL 100.15; 100.40 [1]). As a result, the factual allegations of the information gave each of the Defendants sufficient notice to prepare a defense and are adequately detailed to prevent the Defendants from being tried twice for the same offense (see *People v Konieczny*, 2 NY3d 569, 575 [2004]; *People v Casey*, 95 NY2d 354, 360 [2000]).

ESTABLISHING A VIOLATION OF CODE SECTION §4.182(a)

A violation of Code §4.182(a) may be proven by the People if they establish beyond a reasonable doubt that:

1. There was an emission of an odor,
2. The emitted odor was objectionable as being offensive, foul, unpleasant or repulsive to olfactory reception to a reasonable person of normal sensibilities.
3. The source of the emission,

4. The Defendant emitted (or caused or allowed to be emitted) the objectionable odor, and.
5. The odor was emitted beyond the property borders of the emitting source

The Court interprets Code §4.182(a) as requiring the mental state of “knowingly” [See, *People v. M&H Used Auto Parts and Cars, Inc.*, 799 N.Y.S.2d 784, 2005 N.Y. Slip Opinion 06339]. A person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when he is aware that his conduct is of such nature or that such circumstance exists. *N.Y.S. Penal Law §15.05(2)*.

TRIAL TESTIMONY

Town of Orangetown Assistant Building Inspector Michael Acheson (hereinafter, “Acheson”) testified, *inter alia*, that based on his search of the Town’s IPS system and the Certificate of Authority filed with the County Clerk (Exhibit 2 in Evidence) API Industries operates the subject factory. Jane Slavin ((hereinafter, “Slavin”) testified, *inter alia*, that she has been the Director of the Town of Orangetown’s Building Department since October of 2017, that when she “came on board” in 2017 she was advised of complaints regarding odors emanating from the Aluf factory, that she uses the name Aluf interchangeably with API Industries but it is her belief that API Industries actually runs the subject factory. [Indeed, Defense Counsel conceded in his closing argument that there is only one company that operates the subject factory –API.]

Slavin also testified , *inter alia* , that she visited the factory in November of 2017, that at that time API industries had open permits for retrofitting and adding equipment to the existing plant to deal with the “odor situation”, that she met at the offices in the factory with Anthony Lawson “who runs the plant” and explained the plant to her using a diagram, that upon entering the factory facility after leaving the office she could immediately smell a “burning smell, chemical” and, machines in the factory were running at the time, that on top of the burning smell was a “sweet, floral smell” , that when she continued through the factory her “eyes were watering, I got a very sore throat”, and that two inspectors from her department indicated to her that they experienced the same burning sensation and watery eyes as she did.

Slavin also testified, that she again visited the plant in November of 2018, smelled the same odor but that it was, on that day, milder and not as “aggressive”.

Slavin further testified, *inter alia* , that on December 12, 2018 at 9:10pm she was exiting a building at 20 Greenbush Road ”..and immediately smelled a very strong odor of what I believe is Aluf”, that she went to the Hennessy Center , a basketball arena , a point just southwest of the Aluf plant - where she smelled the odor again, that she stayed there for ten minutes and it was consistently strong, her eyes “began to water and the scratchy throat, again,.. began to happen to me” that she stood facing northeast towards Aluf’s plant...that a mild wind was blowing from the northeast toward her face, that the odor was the same odor she smelled on her inspections inside the plant, and that she determined from these observations that the odor was coming directly from API Industries at 2 Glenshaw.

On cross-examination Slavin testified, *inter alia*, that she was aware of several other commercial entities in the area of the subject property but was not sure what they did, that although she is aware of what an olfactometer is she has never used one and has never been trained in odor assessment.

Trial witness James Ross (hereinafter, "Ross") testified, *inter alia*, that he lives in Orangetown with his spouse and children and has worked for Lamont-Doherty Earth Observatory of Columbia University since 1997. Ross testified that he is an environmental scientist, he works in a research group and does academic research, and his work includes airborne particulate matter and its impact on health.

Ross also testified, *inter alia*, that: On December 13, 2018 at 11:00am he positioned himself in a parking lot to the west of the Aluf plant and at that time he smelled a strong, sweet/fragrant , artificial chemical odor that left a bitter taste on his lips and that the wind was blowing from Aluf, east to west at that time. Ross testified he smelled the same smell, but not as strong, at 1:45pm that day at a parking lot northwest of the intersection of Route 303 and Mountainview (which parking lot is south of Aluf), that the odor again gave him a bitter taste on his lips, and that the wind was coming from the north. Ross further testified that at 5:15 pm that same day, at the same location, with the wind coming from North to South, he smelled the same odor which caused him to have the same bitter taste on his lips and that he considered the odor to be unpleasant and something he would not like to continue smelling. Ross further testified that at 9:15 pm that same day,

there seemed to be no wind, he smelled the same odor but it did not have the effect of giving him a bitter taste on his lips.

Dylan Hofsis, (hereinafter "Hofsis") testified, *inter alia*, at trial that he was employed by the Town of Orangetown as a Junior Public Health Engineer and Zoning Enforcement Officer since September 17, 2018, that part of his duties include responding to odor complaints that come in through the e-mail system where residents are allowed to put in odor complaints on line, that in November of 2018 odor complaints were received and that the nature of the complaints were a "burning plastic sensation, perfumed, in some of them", and that he would respond to the area of complaint "within 10, 15 minutes of that person experiencing the odor".

Hofsis testified, that on November 20, 2018 at 10:20 am he parked in the Dominican College Parking lot and after exiting his vehicle he smelled the "Aluf odor" which he described as "a burned, perfumed, plastic odor", that he then walked to a point on the adjacent rail to trail that abuts the Aluf property (but outside the property boundary of Aluf) and stayed for thirty minutes, that the odor intensity fluctuated with the wind but was "pretty strong on that day", that the odor was "noxious", that he started getting "lightheaded and a little nauseous", that the odor was the "exact odor that I experienced on September 21st when I accompanied the DEC on an inspection of the facility. I walked on the roof.... This was the same odor", and that conclude from the wind blowing from the North while he was South of the subject property "...that that odor was coming from Aluf".

Hofsiss also testified that on December 4, 2018 at approximately 8:15 in the morning he was standing at the same location on the rail trail. He was there for 30 minutes, he smelled the Aluf odor that was a burning plastic sometimes mixed with perfume that was a "noxious, unpleasant, nuisance smell" with an intensity of an 8 on a scale of 1 to 10 and that he detected the source of the Odor as coming from the Aluf property from his location and the wind direction at the time.

Hofsiss further testified that on his September 21, 2018 visit to the facility when he walked on the roof he went in front of the horizontal blowers that exist on the roof of Aluf, that he had previous experience with the odors that are emitted right from the factory and that he smelled that odor on December 4th on the rail trail that abuts the subject property.

In addition Hofsiss testified that on December 5, 2018 at 2:15 pm he was again on the same rail to trail that abuts the Aluf property, that he was responding to a complaint that came in at approximately 1:50, that he stayed 30 minutes, he smelled the same burning, plastic perfume smell, that it caused him to become "lightheaded and nauseous" and that it was the "worst", and a "10 out of 10".

On cross-examination Hofsiss indicated, inter alia, that he was aware of other commercial entities in the area one of which was Praxair which may manufacture industrial gases, that on November 20, 2018 he did not use an olfactometer to test the air despite one being available to him.

The Court notes that all of the other witnesses who testified who were citizens of the Town of Orangetown testified to experiencing odors similar in nature

to those described by Slavin, Ross or Hofsiss with ill effects from those odors. The Court has also considered the testimony of Defendants' witness Louis Rose.

DEFENDANT API INDUSTRIES, INC. ("API")

Based upon all of the credible evidence introduced at trial the court decides as follows:

Verdict on the November 20, 2018 charge against API (Docket 18120420)

This Court finds the Defendant Guilty Beyond a Reasonable Doubt of Violating §4.182(a) on November 20, 2018.

Verdict on the December 4, 2018 charge against API (Docket 18120420)

This Court finds the Defendant Guilty Beyond a Reasonable Doubt of Violating §4.182(a) on December 4, 2018.

Verdict on the December 5, 2018 charge against API (Docket 18120420)

This Court finds the Defendant Guilty Beyond a Reasonable Doubt of Violating §4.182(a) on December 5, 2018.

Verdict on the December 12, 2018 charge against API (Docket 18120426)

This Court finds the Defendant Guilty Beyond a Reasonable Doubt of Violating §4.182(a) on December 12, 2018.

Verdict on the December 12, 2018 charge against API (Docket 18120440)

This Court finds the Defendant Not Guilty of Violating §4.182(a) on December 12, 2018. (*The Court notes that the People informed the Court and Defense Counsel prior to trial that the "correct" date for facts alleged by Complainant Manzare was November 27, 2018 not December 12, 2018).

Verdict on the December 13, 2018 charge against API (Docket 18120432)

This Court finds the Defendant Guilty Beyond a Reasonable Doubt of Violating §4.182(a) on December 13, 2018.

DEFENDANT SUSAN ROSENBERG

In the Court of Appeals case of People v. Byrne, 77 N.Y.2d 476, of the Court opined:

[I]n the absence of a specific expression to the contrary, a legislative intention to impose criminal liability where the actual actor did not harbor a guilty state of mind *and* the person to be held liable did not participate in the proscribed conduct cannot sensibly be assumed.

Thus a corporate officer can be held liable if it is established at trial beyond a reasonable doubt that the corporate officer participated in the proscribed conduct.

In People v. Aldrich Restaurant Corp., et. ano, 53 Misc.2d 574, the Court stated:

"Where there was a murky factual situation with no evidence the defendant participated in an unlawful or criminal act either directly or indirectly so that the corporate acts may have been performed by another corporate officer, or an employee or stranger, an indictment was dismissed as to the individual corporate officer. (People v. Dalsis, 5 A D 2d 28.) The court did suggest, however, that if there was evidence the defendant did participate directly or indirectly it would not have dismissed as to the corporate officer."

This Court finds that the evidence introduced at trial in the instant cases against Susan Rosenberg is insufficient to establish that Susan Rosenberg participated directly or indirectly in the corporate acts complained of or to exclude the possibility that the corporate acts complained of were not performed by (or permitted by) another corporate officer, or an employee.

Accordingly, the Court finds the Defendant Susan Rosenberg not guilty of the charges against her contained in the Informations filed under Docket Nos. 18120422, 18120428, 18120436, 18120441 and those charges are hereby dismissed.

THE "REAL PROPERTY" DEFENDANTS

As previously noted, §4.182(a) states in pertinent, part that: "No **person, entity or process** will emit, or cause or allow to be emitted, objectionable odors....." [Emphasis Added.] Accordingly, a natural person, a corporation, a trust (or any other type of entity) may be charged, where warranted, with violating §4.182(a).

The deed to the subject property placed in evidence upon the People's case indicates that Reuven Rosenberg and Susan Rosenberg conveyed the subject property to Aluf Real Property, Inc. in 1994.

The restrictive covenant placed in evidence indicates that all shares of Aluf Real Property, Inc. are owned by the R. Rosenberg Family Trust (referred to, hereinafter, as "the Trust") and that the Trustees of the Trust are Miriam Oratz, Giselle Schonkopf and Joseph Rosenberg (referred to, hereinafter, collectively, as the "the Trustees").

Aluf Real Property, Inc.

While there are instances where an owner of real property who is a landlord out of possession may be held liable for the conduct of a tenant, the credible trial evidence in this matter fails to establish beyond a reasonable doubt that Aluf Real Property, Inc. is responsible for the conduct of API Industries, Inc. or the proscribed conduct at the subject property such that it should be held liable for a violation of Code § 4.182(a).

Accordingly, the Court finds the Defendant Aluf Real Property, Inc. not guilty of the charges against it contained in the Informations filed under Docket Nos. 18120418, 18120423, 18120430, 18120439 and those charges are hereby ordered dismissed.

The Trust Defendants

The credible trial evidence in this matter fails to establish beyond a reasonable doubt that The Trust and /or The Trustees of The Trust are responsible for the conduct of API Industries, Inc. or the proscribed conduct at the subject property such that it should be held liable for a violation of Code § 4.182(a).

Accordingly, the Court finds that:

- (1) The Defendant R. Rosenberg Family Trust is not guilty of the charges against it contained in the Informations filed under Docket Nos.

18120419, 18120427, 18120434, 18120442 and those charges are hereby ordered dismissed.

(2) The Defendant Joseph Rosenberg, As Trustee of the R. Rosenberg Family Trust, is not guilty of the charges against him contained in the Informations filed under Docket Nos. 18120443, 18120417, 18120429, 18120435 and those charges are hereby ordered dismissed.

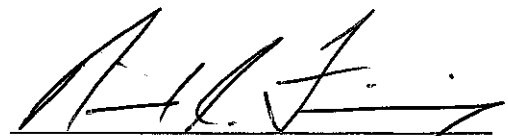
(3) The Defendant Miriam Oratz, As Trustee of the R. Rosenberg Family Trust, is not guilty of the charges against her contained in the Informations filed under Docket Nos. 1812016, 18120424, 18120433, 18120445 and those charges are hereby ordered dismissed.

(4) The Defendant, Giselle Schonkopf, As Trustee of the R. Rosenberg Family Trust, is not guilty of the charges against her contained in the Informations filed under Docket Nos. 18120421, 18120425, 18120437, 18120444 and those charges are hereby ordered dismissed.

It is hereby ORDERED, that the People and the Defendant API Industries, Inc. and its' Counsel appear for sentencing of said Defendant on the charges of which it was convicted on **November 26, 2019 at 11:00am.**

ENTER,

Dated: Orangeburg, New York
October 31, 2019


Town Justice

To:

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